

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

**KIARA PERALTA and NAHOMI DAVID,**  
individually and on behalf of all others  
similarly situated,

**Plaintiffs,**

**-against-**

**22-CV-04864 (ALC)**

**CLAIRE’S BOUTIQUES, INC.,**

**Defendant.**

-----X

**DEFENDANT’S RESPONSE TO PLAINTIFFS’  
NOTICE OF SUPPLEMENTAL AUTHORITY (DOCKET NO. 25)**

Defendant Claire’s Boutiques, Inc. (“Claire’s”) respectfully responds to the “Notice of Supplemental Authority” submitted yesterday by Plaintiffs (Docket No. 25). Not surprisingly, Plaintiffs offer the non-controlling Western District of New York decision solely for its holding. Nevertheless, Claire’s notes the following with respect to that decision in *Rath v. Jo-Ann Stores, LLC*, 2022 WL 17324842 (W.D.N.Y. Nov. 29, 2022):

- The *Rath* decision did not address the standing argument presented by Claire’s in the instant case. 2022 WL 17324842 at \*1 (“Defendant does not now challenge Plaintiff’s standing.”).
- While the *Rath* decision discussed the First Department’s 2019 *Vega* decision as a state appellate decision on the issue, the *Rath* decision does not refer to nor address the state appellate decision from the other Department (*i.e.*, the Second Department) issued twenty days prior to *Rath*. *Gutierrez v. Bactolac Pharmaceutical, Inc.*, 2022 WL 16826781, \*2 (2d Dep’t Nov. 9, 2022). As noted in Claire’s reply brief (at 10), the Second Department in *Gutierrez* departed from the First Department in *Vega* and held that frequency of pay is not the same as “unpaid wages,” and therefore there is no private right of action under Labor Law §191.

- While the *Rath* decision drew a conclusion that the New York Court of Appeals would likely find that Labor Law §191 confers a private right of action for frequency-of-pay claims, its reasoning is not persuasive and Claire's respectfully submits that this Court should instead consider and accept its analysis of the Court of Appeals' 2022 decision in *Konkur v. Utica Academy of Science Charter Sch.*, 38 N.Y.3d 38, 165 N.Y.S.3d 1 (2022) as contained in Claire's moving brief (at 16-17) and Claire's reply brief (at 8-9).

Dated: New York, New York  
November 30, 2022

Respectfully submitted,

COZEN O'CONNOR  
*Attorneys for Defendant*



By:

---

Michael C. Schmidt (MS7841)  
3 World Trade Center  
175 Greenwich Street – 55<sup>th</sup> Floor  
New York, New York 10007  
(212) 453-3937